Office - Supreme Court, U. S.
FILED
MAY 4 1943
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 921

PACIFIC STEAMSHIP LINES, LTD.
(a corporation),
Petitioner,

vs.

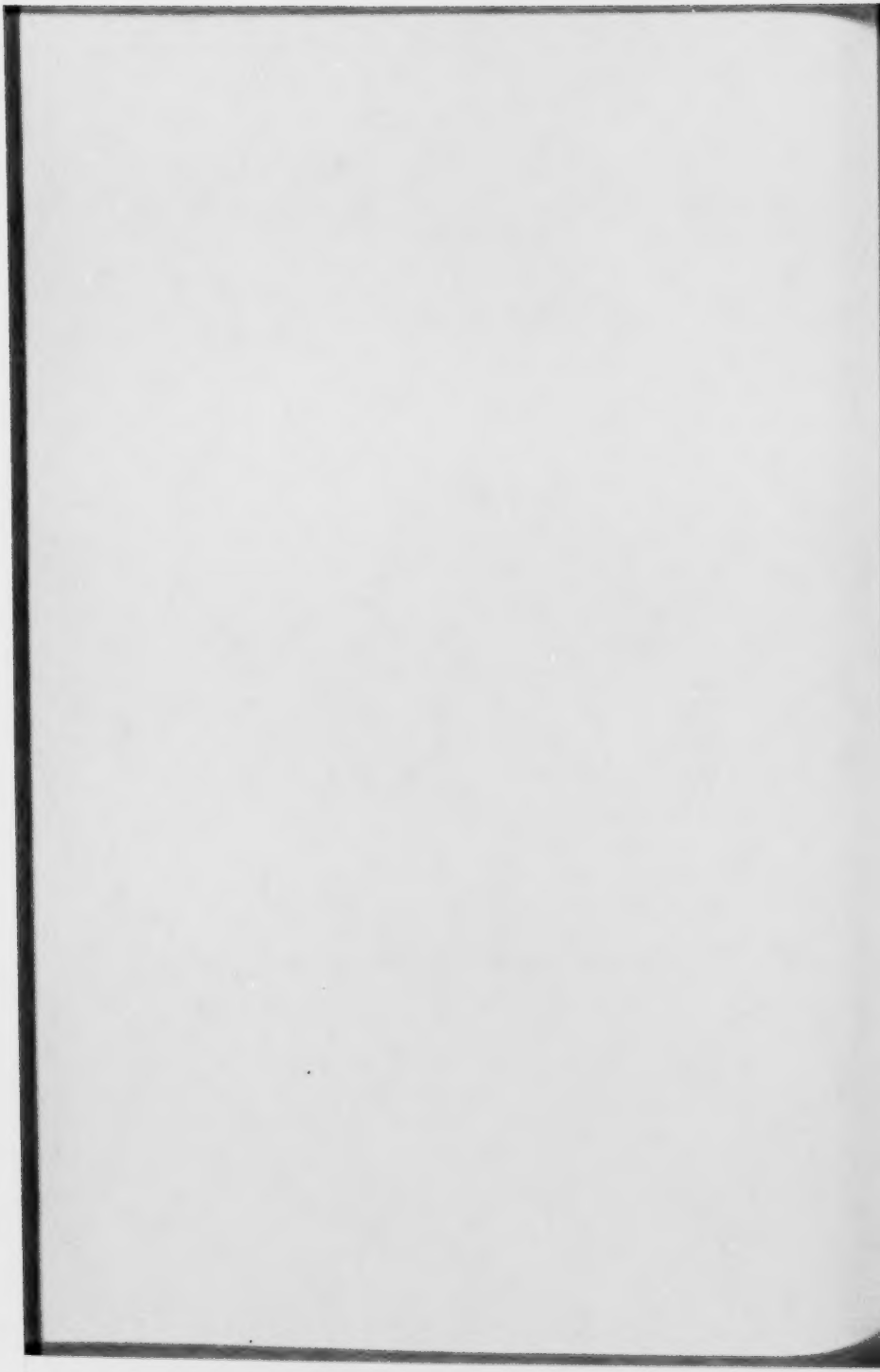
ROY W. CROSBY,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

SIDNEY M. EHRMAN,
Nevada Bank Building, San Francisco, California,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA



Subject Index

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	3
Argument	4
1. The Circuit Court of Appeals correctly held that it was error for the special master to refuse to strike the testimony of the witness Walsh from the record for refusal to produce his correspondence relating to the matters to which he testified on direct examination	4
2. The San Francisco representative of the British Ministry of War Transport was not a public officer	5
3. The Circuit Court of Appeals correctly assumed jurisdiction of the appeal	6
Conclusion	6

Table of Authorities Cited

Cases	Pages
Aluminum Industries, Inc. v. Egan, 61 Ohio App. 111, 22 N. E. (2d) 459 (1938)	5
Cumberland R. Co. v. Girdner (Ky.), 192 S. W. 873 (1917)	5
Thomas v. Dower (Wash.), 297 P. 1094 (1931)	5
United States v. Keown, 19 F. Supp. 639 (1937)	5

Codes and Statutes

Bankruptcy Act, Section 77B	3, 6
California Code of Civil Procedure, Section 1881(5)	2, 6
Judicial Code, Section 240(a), as amended by the Act of February 13, 1925 (28 U.S.C. §347)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 921

PACIFIC STEAMSHIP LINES, LTD.
(a corporation),
Petitioner,

vs.

ROY W. CROSBY,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court below (R. 678) is reported in 133 F(2d) Adv. 470. There was no opinion in the District Court (Northern District of California).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 25, 1943 (R. 692). A petition for rehearing was seasonably made and denied (R. 693).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. §347).

QUESTIONS PRESENTED.

1. Whether it was reversible error for the Special Master to refuse to strike the testimony of the witness Walsh from the record for refusal to produce correspondence relating to the matters concerning which he testified on direct examination.

2. Whether the head of the British Ministry of War Transport of the Pacific Coast is a public officer within the meaning of Section 1881(5) of the Code of Civil Procedure of the State of California.

3. Whether the Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal.

STATUTE INVOLVED.

The pertinent provisions of the statute involved are:

California Code of Civil Procedure, Section 1881(5),

which reads as follows:

> "A public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."

STATEMENT.

Respondent is a ship broker duly licensed under the laws of the State of California. He was employed by petitioner, a corporation under the jurisdiction of the Bankruptcy Court in a proceeding under 77B of the Bankruptcy Act, to find a purchaser for the "Emma Alexander" and the "H. F. Alexander", two vessels owned by petitioner (R. 98). Respondent was to be paid a commission of 5% of the sale price in the event he should produce such a purchaser (R. 605). Respondent and his associates submitted the vessels to the British Ministry of Shipping, now British Ministry of War Transport, in September or October of 1940 (R. 459), and continued negotiations with the British Ministry of War Transport until respondent was advised that the vessels had been sold to the Ministry of War Transport on March 10, 1941 (R. 168). Petitioner was kept advised at all times of the progress of respondent's efforts to sell the vessels to the British Ministry of War Transport (R. 171). On January 3, 1941, the British Ministry of War Transport advised respondent that it was interested in the purchase of the vessels (R. 160), and this information was communicated to Mr. James, president of petitioner (R. 161). Mr. James thereupon entered into direct negotiations with Mr. Walsh, the San Francisco representative of the British Ministry of War Transport (R. 573), and as a result of such negotiations the sale of the vessels was consummated. Mr. James did not advise respondent that he was dealing direct with Mr. Walsh (R. 172). After the sale petitioner refused to pay respondent a commission on the sale (R. 635). At

the hearing before the Special Master Mr. Walsh testified without protest upon direct examination to the instructions received by him from the New York office of the British Ministry of War Transport in connection with the sale of the vessels, and on cross-examination testified that the sale was the subject of considerable correspondence between the San Francisco office and the New York office of the British Ministry of War Transport. Mr. Walsh refused to produce any of the correspondence passing between his office and the New York office, and the Special Master refused to direct the witness at the request of counsel for petitioner to produce such correspondence (R. 530 et seq.).

ARGUMENT.

1. THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT IT WAS ERROR FOR THE SPECIAL MASTER TO REFUSE TO STRIKE THE TESTIMONY OF THE WITNESS WALSH FROM THE RECORD FOR REFUSAL TO PRODUCE HIS CORRESPONDENCE RELATING TO THE MATTERS TO WHICH HE TESTIFIED ON DIRECT EXAMINATION.

The right of cross-examination is a fundamental right and the opposing party is entitled to question a witness with regard to any relevant matter concerning which he testified on direct examination, including the right to have the court direct the witness to produce written evidence relating to such matter. A witness should not be permitted to testify on direct examination and refuse to submit to cross-examination on the claim of privilege, and we submit it is immaterial whether or not Mr. Walsh had the right to claim

immunity. The fact remains that he did testify on direct examination, and having done so, it was the duty of the Special Master to direct him to produce any correspondence requested by counsel relating to the matter testified to on direct examination.

In the case of *Thomas v. Dower* (Wash.), 297 P. 1094 (1931), the court said:

> "Cross-examination is a valuable right, and where a witness refuses to answer thereon questions which are proper and material subject of inquiry, in view of the testimony which he gave upon his direct examination, his entire testimony will be stricken or disregarded. Millikan v. Booth, 4 Okl. 713, 46 P. 489; Cumberland R. Co. v. Girdner, 174 Ky. 761, 192 S. W. 873; McElhannon v. State, 99 Ga. 672, 26 S. E. 501; People v. Freshour, 55 Cal. 375. The trial court properly eliminated the testimony of the appellant."

See also:

Cumberland R. Co. v. Girdner (Ky.), 192 S. W. 873 (1917);

United States v. Keown, 19 F. Supp. 639 (1937);

Aluminum Industries, Inc. v. Egan, 61 Ohio App. 111, 22 N. E. (2d) 459 (1938).

---

2. THE SAN FRANCISCO REPRESENTATIVE OF THE BRITISH MINISTRY OF WAR TRANSPORT WAS NOT A PUBLIC OFFICER.

It is submitted that it is too clear for argument that the local representative of the British Ministry of War

Transport is not a public officer within the meaning of Section 1881(5) of the Code of Civil Procedure of the State of California. The record fails to show that the correspondence requested contained communications made to him in official confidence or that the public interest would suffer by any disclosure.

---

3. THE CIRCUIT COURT OF APPEALS CORRECTLY ASSUMED JURISDICTION OF THE APPEAL.

The record contains numerous references to the fact that the respondent was under the jurisdiction of the Bankruptcy Court in a 77B proceeding (R. 55, 56, 176, 179, 435, 493), and we therefore respectfully submit that the Circuit Court of Appeals properly assumed that the proceedings were subject to the jurisdiction of the Bankruptcy Court.

CONCLUSION.

It is therefore respectfully submitted that the petition should be denied.

Dated, San Francisco, California,
April 28, 1943.

SIDNEY M. EHRMAN,
Attorney for Respondent.